

**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF GEORGIA  
VALDOSTA DIVISION**

<b>UNITED STATES OF AMERICA</b>	:	
	:	
<b>v.</b>	:	<b>CRIM. NO. 7:09-CR-8</b>
	:	
<b>DWAIN WILLIAMS</b>	:	

**UNITED STATES MEMORANDUM OF LAW IN SUPPORT OF ITS  
NOTICE OF INTENT TO AUTHENTICATE AND OFFER BUSINESS  
RECORDS VIA AFFIDAVIT IN LIEU OF IN PERSON TESTIMONY  
PURSUANT TO RULE 902(11)**

COMES NOW the United States of America, by and through the United States Attorney for the Middle District of Georgia, and submits this Memorandum of Law in Support of its Notice of Intent to Introduce Business Records through affidavit (rather than through witness testimony) pursuant to Rule 902(11) i/c/w 803(6) Federal Rules of Criminal Procedure.

Under year 2000 amendments to the Federal Rules of Criminal Procedure, records of regularly conducted business activity – Rule 803(6) – are admissible hearsay without an authenticating witness. The commentary to the amendment states as follows: “Parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. The notice requirement in Rule 902(11) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the

foundation.” (Emphasis added.)

The original exhibits were produced in discovery, and have on this date, been sent again via pdf/e-mail to counsel for the defendant. Moreover, the same will be made available for inspection in the U.S. Attorney’s Office.

The Custodians of Records are expected to sign and return the affidavits of authentication shortly. Drafts of the unsigned affidavits have been sent to counsel. 1) Records of Custodian of Records from an internet service provider.

As to each category of documents the affiant will swear that the records in question were:

(A) made at or near the time of the occurrence of the matters set forth, by or from information transmitted by a person with knowledge of those matters;

(B) kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

See Rule 902(11), Federal Rules of Evidence.

### **Case Law**

This research has found four reported cases addressing and approving the use of affidavits to authenticate business records under the 2000 amendments.

United States vs. Klinzing, 315 F.3d 803 (7<sup>th</sup> Cir. 2003) (rejecting a constitutional challenge under the Confrontation Clause to the admission

of business records via affidavit complying with Rule 902 (11)).

Clough vs. Commissioner of Internal Revenue, 119 T.C. 183, 187, 190 (U.S. Tax Court 2002) ( business records admitted via affidavit under Rule 902 (11) over objection where the objecting party offered no evidence that the disputed documents were unreliable ).

Spurlock v. Commissioner of Internal Revenue, 85 T.C.M. (2003 WL 1987156), (page references not available.) The court held that an affidavit of the custodian of business records complying with Rule 902(11) was sufficient to establish their admissibility. The court also noted that the “Checks are self-authenticating documents under Rule 902(9) [ . . . ], and that “the checks or any notations thereon may also qualify as a statement in documents affecting an interest in property under Fed.R.Evid. 803(15).” (Emphasis added)

**Conclusion**

For the foregoing reasons, in accordance with Rule 902(11), the United States submits that the designated affidavits and business records are admissible without further necessity of testimony as to their authenticity.

Respectfully submitted this 25<sup>th</sup> day of June, 2010.

G.F. PETERMAN, III  
ACTING UNITED STATES ATTORNEY

By: s/JIM CRANE  
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CERTIFICATE OF SERVICE

I, Jim Crane, Assistant United States Attorney, hereby certify that on the 25<sup>th</sup> of June, 2010, I electronically filed the within and foregoing Memorandum of Law in support of Authentication of Business Records via Affidavit with the United States District Court for the Middle District of Georgia using the CM/ECF system which will send notification of such filing to the following:

Ms. Nicole Williams  
Federal Defender of MDGA.  
Attorney for defendant

BY: s/Jim Crane  
Assistant United States Attorney  
United States Attorney's Office